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A basic tenet of our legal system is that laws should be drawn to give the people a warning as to what actions are impermissible. The court of appeals attempted to accomplish this goal. It has redefined the guidelines by which a lawyer may act and be judged. The decision has not granted the lawyer *carte blanche* to recklessly criticize a judicial proceeding, nor has it cast aside the right to a fair trial as the dissent suggests. On the contrary, it is implicit in the decision that a lawyer's comments are needed to guarantee a fair trial. A criminal trial can evoke the emotion of the public and produce massive coverage by the press. Comment by a defendant's attorney at the initial stage of the case may offset an inherent public presumption of guilt that accompanies an indictment.<sup>39</sup> Instead of having to remove himself from the case, which would deprive the defendant of counsel, or being forced to remain silent with the fear of disciplinary measures, the active attorney may criticize the court.

The court, in redefining the area of acceptable criticism by the attorney, has reassured the defendant of a fair trial. The litigating counsel, with the knowledge of his rights and duties, may now return to the role of the learned judicial critic.

JEFFREY R. COOPER

## **The End of Fee Schedules: The Sherman Act Applies to Lawyers Also**

Desiring to purchase a home in Fairfax County, Virginia, petitioners contacted a local lawyer concerning a title examination. The lawyer quoted them the fee suggested in the minimum fee schedule published by the respondent Fairfax County Bar Association (the "County Bar") and enforced by the respondent Virginia State Bar (the "State Bar").<sup>1</sup> In an attempt to find an attorney willing to

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"[W]e do recognize the great benefits derived from allowing uninhibited comment by knowledgeable attorneys involved in civil litigation." *Id.* at 259.

39. 6 HARV. CIV. RIGHTS-CIV. LIAB. L. REV. 595, 599 (1971).

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1. The State Bar had published reports condoning fee schedules and had issued two ethical opinions indicating that fee schedules could not be ignored. VIRGINIA STATE BAR, 1969 MINIMUM FEE SCHEDULE REPORT; VIRGINIA STATE BAR, 1962 MINIMUM FEE SCHEDULE REPORT; VIRGINIA STATE BAR COMM. ON LEGAL ETHICS, OPINIONS, NO. 170 (1971); VIRGINIA STATE BAR COMM. ON LEGAL ETHICS, OPINIONS, NO. 98 (1960). The reports "provided the impetus for the County Bar, on two occasions, to adopt minimum fee schedules." *Goldfarb v. Virginia State Bar*, 95 S. Ct. 2004, 2015 n.21 (1975).

charge less than the schedule dictated, the petitioners wrote letters to 36 other lawyers inquiring about their fees for title examination. Nineteen written replies were received; all indicated that the responding attorney would adhere to the County Bar's fee schedule. Petitioners, on behalf of themselves and similarly situated home owners, brought a class action for injunctive relief and damages in the United States District Court for the Eastern District of Virginia against the State Bar and the County Bar,<sup>2</sup> alleging that the operation of the minimum fee schedule violated section 1 of the Sherman Antitrust Act.<sup>3</sup> After a trial solely on the issue of liability, the district court found the State Bar to be exempt from antitrust prosecution for its role with respect to the fee schedule.<sup>4</sup> As to the County Bar, however, the district court found liability and enjoined the publication of the fee schedule. The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision as to the State Bar, but reversed as to the County Bar,<sup>5</sup> holding that the fee schedule did not restrain interstate commerce<sup>6</sup> and that the practice of law is a "learned profession"<sup>7</sup> which is exempt from the provisions of the antitrust laws. On certiorari to the United States Supreme Court, *held*, reversed and remanded:<sup>8</sup> The minimum fee schedule, as published by the County Bar and enforced by the State Bar,

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2. *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491, 492 n.1 (E.D. Va. 1973). The suit originally included the Fairfax County Bar Association, the Alexandria Bar Association, the Arlington County Bar Association and the Virginia State Bar as defendants, but the Alexandria and Arlington associations agreed to a consent judgment whereby they were directed to cancel their existing fee schedules and were enjoined from publishing future fee schedules.

3. 15 U.S.C. § 1 (1970). Section 1 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

4. See notes 30-36 *infra* and accompanying text. The State Bar also contended that it was protected by the eleventh amendment, but the district court's holding as to the State Bar did not require the issue to be decided. 355 F. Supp. at 496. Even when a state is not named as a party, a suit by private persons may nonetheless be barred by the eleventh amendment if the liability imposed must be paid from public funds in the state treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974). The hallmark of *Edelman*, however, is the requirement that any liability imposed must be paid from public funds in the state treasury. It is unlikely that any liability paid out of a state bar association's treasury will be sufficient to invoke an eleventh amendment immunity.

5. *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir. 1974).

6. See notes 24-29 *infra* and accompanying text.

7. See notes 37-44 *infra* and accompanying text.

8. Upon remand, the district court was to consider whether the eleventh amendment, exempted the State Bar from antitrust prosecution under the circumstances. 95 S. Ct. at 2015 n.22.

constitutes price fixing in violation of section 1 of the Sherman Act. *Goldfarb v. Virginia State Bar*, 95 S. Ct. 2004 (1975).

The use of fee schedules dates back at least to 1795, when the Rhode Island Bar Association agreed that "no member shall give any opinion upon any law question for a sum less than \$1.00."<sup>9</sup> Generally, though, the use of fee schedules did not flourish until the 1950's.<sup>10</sup> Since the district court opinion in *Goldfarb*, however, many bar associations have chosen to abandon their fee schedules rather than run the risk of a lawsuit.<sup>11</sup>

Most of these fee schedules have their origin in Canon 12 of the old ABA Canons of Professional Ethics.<sup>12</sup> The current provision dealing with attorney's fees in the Virginia State Bar Code of Professional Responsibility (which is identical to the provision in the ABA Code of Professional Responsibility) indicates that fees vary according to many factors, and that "[s]uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject to reasonable fees."<sup>13</sup> Although this suggests a voluntary schedule, the ABA Committee on Professional Ethics has

9. Maxwell, *Bar Association Minimum Fee Bills: Their Impact Upon C.L.L.A. Practices*, 71 COM. L.J. 278, 278 (1966).

10. Merrell, *Do We Need A Fee Schedule?*, 42 MICH. ST. B.J. Apr. 1963, at 35.

11. Wall Street J., Apr. 11, 1973, at 1, col. 1. The policy aspects of minimum fee schedules have been widely discussed. See, e.g., Arnould & Corley, *Fee Schedules Should be Abolished*, 57 A.B.A.J. 655 (1971); Miller & Weil, *Let's Improve, Not Kill, Fee Schedules*, 58 A.B.A.J. 31 (1972); Morgan, *Where Do We Go From Here With Fee Schedules?*, 59 A.B.A.J. 1403 (1973); Comment, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L.J. 1164; Comment, *Minimum Fee Schedules—The Battle and the War: Goldfarb at the Fourth Circuit*, 60 VA. L. REV. 1415 (1974); Note, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption that Doesn't Exist*, 3 U.C.L.A.—ALASKA L. REV. 207 (1974).

12. Arnould & Corley, *supra* note 11, at 655. The ABA Canons of Professional Ethics were adopted in 1908. Canon 12, in detailing the procedure for setting fees, lists six relevant factors; one of these is the "customary charges of the Bar for similar services." Canon 12 also indicates that

[i]n determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In 1938, the Supreme Court of Virginia adopted Canons of Professional Ethics which were essentially equivalent to the ABA's canons. 171 Va. xxiii (1938). Effective January 1, 1970, the ABA Canons of Professional Ethics were replaced by a Code of Professional Responsibility. Virginia's Canons of Professional Ethics were replaced by a Code of Professional Responsibility (again, essentially equivalent to the ABA's code) as of January 1, 1971. 211 Va. 295 (1970).

13. VIRGINIA STATE BAR CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-18, *printed at* 211 Va. 302 (1970).

said that "the habitual charging of fees less than those established by a minimum fee schedule, or the charging of such fees without proper justification, may be evidence of unethical conduct . . . ."<sup>14</sup>

The basic idea underlying a fee schedule is to provide attorneys with adequate compensation and, as an ethical matter, to discourage attorneys from soliciting business by discounting prices. However, as a consequence of the enforcement mechanisms available in bar associations' ethical codes, attorneys are forced to charge fees in accordance with the fee schedules' rates. The invariable result of the use of fee schedules is thus a system which offers the consumer of legal services substantial uniformity of price. Any agreement among competitors not to charge below a specified price has been held to be a "per se" violation of the Sherman Act—that is, it is illegal without regard to the reasonableness or the intent of the agreement.<sup>15</sup> Rejecting the County Bar's position that its fee schedule was merely advisory, the Supreme Court stated that the concerted action by members of the bar to control prices constituted "a classic illustration of price fixing,"<sup>16</sup> and it was thus held to be a per se violation of section 1.

The Court did indicate, however, that a purely advisory fee schedule, issued to provide guidelines or to exchange price informa-

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14. ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 302, *printed at* 48 A.B.A.J. 159 (1962); *cf.* ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 585 (1962). *But see* ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 323, *printed at* 56 A.B.A.J. 1087 (1970) ("mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action."). For the corresponding Virginia opinions, see note 1 *supra*.

15. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). Under a per se rule, the motives of the conspirators are irrelevant—good intentions are thus not a defense. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Liability depends solely upon the existence of an agreement to fix prices; actual adherence to the price schedule need not be shown. *Id.* at 224-26 n.59.

16. 95 S. Ct. at 2011.

17. 95 S. Ct. at 2010. A determination of the "different question" mentioned by the Court would require an inquiry into the type of price information exchanged in an advisory fee schedule. An association does not violate section 1 by participating in statistical reporting on the average cost to all members without identifying the parties to specific transactions. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925). Detailed reports of specific transactions with identified customers though, even without an agreement to adhere to a price schedule, has been held illegal. *United States v. Container Corp. of America*, 393 U.S. 333 (1969). Thus, while the mere compilation and dissemination among competitors of pricing statistics does not prove a Sherman Act conspiracy, the frank exchange of all the details of a fairly complicated pricing system is a factor appropriately considered in determining the existence of a price-fixing conspiracy. *Morton Salt Co. v. United States*, 235 F.2d 573 (10th Cir. 1956).

tion, without a showing of an actual restraint on trade would present a "different question."<sup>17</sup> A strong argument exists, however, for treating the two situations as the same. Neither the nonmandatory nature of the rates, nor the absence of official sanctions, should be sufficient to eliminate liability.<sup>18</sup> The desire of attorneys to comply with announced professional norms, coupled with the natural appeal of a scheme promising increased income, should inevitably result in a form of horizontal price fixing, a per se unreasonable restraint of trade.<sup>19</sup>

Once the Court determined that a minimum fee schedule constituted a per se restraint of trade, the bar associations had to be considered in violation of the Sherman Act<sup>20</sup> unless found to be exempt. According to *Goldfarb*, such exemption could have existed under the following theories: first, that the practice of law is a purely local activity, not involved in interstate commerce;<sup>21</sup> second, that the promulgation and maintenance of such schedules constitute "state action" within the meaning of *Parker v. Brown*;<sup>22</sup> or third, that the practice of law is neither trade nor commerce, but rather a "learned profession."<sup>23</sup>

The Court's first inquiry regarding possible exemptions involved the jurisdictional applicability of the Sherman Act to the legal profession. Since Congress passed the Sherman Act on the basis of its power to regulate interstate commerce, the reach of the Sherman Act is coextensive with that power.<sup>24</sup>

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18. *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950) (minimum charges established by local real estate board constituted price fixing).

19. *Id.*

20. Instances where fee schedules have previously been held to violate the Sherman Act include, for example, the pricing schedules issued by state pharmaceutical associations in *Northern Cal. Pharmaceutical Ass'n v. United States*, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962), and *United States v. Utah Pharmaceutical Ass'n*, 201 F. Supp. 29 (D. Utah), *aff'd per curiam*, 371 U.S. 24 (1962). However, fixed commissions charged small investors have been held not to violate antitrust laws against price fixing because the Securities and Exchange Commission's authority to approve or disapprove commission rates carries with it the power to grant the securities industry immunity from antitrust laws. *Gordon v. New York Stock Exch., Inc.*, 95 S. Ct. 2598 (1975).

21. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

22. 317 U.S. 341 (1943).

23. *FTC v. Raladam Co.*, 283 U.S. 643 (1931). At the time of the *Goldfarb* decision, the Justice Department had an antitrust case pending in the United States District Court in Oregon, seeking to enjoin the Oregon State Bar from further publication, distribution or suggestion of a schedule of attorneys' fees. On the State Bar's motion for summary judgment, the court rejected the application of both the "state action" and "learned profession" exemptions. *United States v. Oregon State Bar*, 385 F. Supp. 507 (D. Ore. 1974).

24. *See, e.g., United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

Two distinct categories of activities have been held to involve interstate commerce: those directly in the flow of interstate commerce, and those which are intrastate in nature but which nevertheless substantially affect interstate commerce.<sup>25</sup> In holding that a title examination is an integral part of an interstate transaction, the Court in *Goldfarb* demonstrated that the adoption and use of the schedule substantially affected interstate commerce in two ways. The first was that a significant portion of funds furnished for purchasing homes in Fairfax County came from outside the state and that the lenders placing these funds required title examinations. The second was that significant amounts of real estate loans in Fairfax County were guaranteed by federal agencies located outside the state. "Thus . . . the transactions which create the need for the particular legal services in question frequently [were] interstate transactions."<sup>26</sup>

Although the Court stated that there may be legal services which have no nexus with interstate commerce, and thus are beyond the reach of the Sherman Act, such a situation would be quite unique in view of the broad scope given the commerce power of Congress.<sup>27</sup> A restraint on trade which relates only to the local aspect of a total process may nonetheless be subject to the provisions of the Sherman Act.<sup>28</sup>

Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is . . . . If it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze.<sup>29</sup>

On the question of the "state action" exemption, the district court and the Fourth Circuit reached similar conclusions—that the

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See generally Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961).

25. *Burke v. Ford*, 389 U.S. 320 (1967) (per curiam); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

26. 95 S. Ct. at 2011.

27. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Wickard v. Filburn*, 317 U.S. 111 (1942). But see *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

28. In oral argument, counsel for the petitioners went so far as to contend that a local bar fee schedule would affect interstate commerce in the case of a fee charged for drawing a will for "a little old lady in the middle of the state" who had no out-of-state beneficiaries or property. Allen, *Do Fee Schedules Violate Antitrust Law?*, 61 A.B.A.J. 565, 567 (1975).

29. *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949).

State Bar was exempt from the Sherman Act for whatever part it played in the County Bar's adoption and enforcement of its fee schedule. This "state action" exemption originated in *Parker v. Brown*,<sup>30</sup> where the Supreme Court ruled that the Sherman Act did not govern actions undertaken by state officials at the direction of the state's legislature. The case has since been interpreted to confer antitrust immunity on private persons who engage in anticompetitive activities under a similar state mandate.<sup>31</sup>

The *Parker* court limited the reach of its decision by asserting that states could not immunize private antitrust violations by merely "authorizing" private anticompetitive activities.<sup>32</sup> *Parker* suggested that state authorization would not be found if the state simply failed to restrain, or acquiesced in, private anticompetitive schemes. To be held state action, the anticompetitive practices must instead be part of an affirmative statutory duty, or otherwise compelled.<sup>33</sup>

The inquiry in *Goldfarb* was directed at precisely this point. Through its legislature, Virginia has authorized its highest court to regulate the practice of law.<sup>34</sup> The State Bar contended that it was exempt because it is by statute an "administrative agency" of the highest court of Virginia, and is authorized to regulate professional conduct under the court's authority.<sup>35</sup> The County Bar, although it is a voluntary association and not a state agency, claimed the ethical codes and the activities of the State Bar "prompted" it to issue

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30. 317 U.S. 341 (1943). It has been said that the purpose of the exemption is "to prevent confrontations between two sovereign entities, where certain economic behavior is allowed in the particular state that contravenes provisions of the federal antitrust laws." Comment, *The Anatomy of Judicial Exemptions from Antitrust: A Study in Gap-Filling*, 15 WAYNE L. REV. 813, 815 (1969).

31. See Kintner & Kaufman, *The State Action Antitrust Immunity Defense*, 23 AM. U.L. REV. 527, 530 (1974).

32. 317 U.S. at 351-52.

33. *Id.* at 350. Two Supreme Court decisions have suggested that where the defendants' conduct is essentially discretionary, rather than compelled by law, the *Parker* state action immunity for antitrust violations may not be appropriate. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Court denied that Canadian authorization of anticompetitive conduct provided state action immunity, stating that there was "nothing to indicate that such law in any way compelled discriminatory purchasing . . ." *Id.* at 707. The Court referred to *Parker* as a case involving mandatory state regulations. *Id.* at 706. See also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). See generally Simmons & Fornaciari, *State Regulation as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine*, 43 U. CIN. L. REV. 61 (1974).

34. VA. CODE § 54-48 (1974 Repl. Vol.).

35. VA. CODE § 54-49 (1974 Repl. Vol.).



fee schedules, and thus its actions also were to be considered state action for Sherman Act purposes. However, neither the State of Virginia, through its Supreme Court Rules, nor the Virginia Supreme Court's ethical codes, required the promulgation of a fee schedule. Thus, although bar associations may arguably be part of the state, their fee schedules are not. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State . . . ."<sup>36</sup>

On the third and final issue of whether legal services are "trade or commerce" within the meaning of section 1 of the Sherman Act, the district court and the Fourth Circuit in *Goldfarb* reached divergent conclusions, with the Fourth Circuit finding a well-defined "learned profession" exemption. The use of the term "learned profession" refers indiscriminately to two theories under which the professions have sought antitrust immunity. The first is a "personal services" exemption, which arose in 1922 from the language of *Federal Baseball Club, Inc. v. National League of Professional*

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36. 95 S. Ct. at 2015. Finding it unnecessary to continue its analysis, the Supreme Court failed to refine further the scope of the *Parker* doctrine. The Court has thus left unresolved a conflict among the lower courts as to what has normally been seen as an additional requirement for the state action exemption—that the activities of private parties be "actively supervised" by independent state officials.

A majority of the federal courts have interpreted the requirement of active supervision to mean that the practice in question be subjected to meaningful regulation and supervision by the state to the end that the activities result from the considered judgment of the state regulatory authority. *E.g.*, *Norman's on the Waterfront v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971); *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971). *See also* Kintner & Kaufman, *supra* note 31. A minority interpretation is found in *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971). In *Washington Gas Light* a state regulatory agency had the power to prohibit the challenged activities, but did not do so. Inferring that the silence of the state agency implied its approval, the Fourth Circuit found that the active supervision requirement had been met.

The Fourth Circuit's approach significantly expands the narrow state action exemption recognized in *Parker*. Sufficient state action to provide an exemption from federal antitrust laws would seem to necessitate a more active administrative and regulatory role on the part of the state than mere acquiescence. The Sherman Act has been interpreted as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). In view of this strong federal policy favoring economic competition, the liberal viewpoint of *Washington Gas Light* appears unwarranted, and it has been uniformly criticized by legal commentators. *See, e.g.*, Simmons & Fornaciari, *supra* note 33, at 87-88; Note, *Of Raisins and Mushrooms: Applying the Parker Antitrust Exemption*, 58 VA. L. REV. 1511, 1539-42 (1972); 85 HARV. L. REV. 670, 671-74 (1972).

*Baseball Clubs*.<sup>37</sup> This exemption, however, has been discredited completely by subsequent Supreme Court decisions,<sup>38</sup> and any reliance by the Fourth Circuit on *Federal Baseball* to support the notion that personal services enjoyed a blanket exemption from the antitrust laws seems to be misplaced.<sup>39</sup>

The second line of cases involves professional services and has its origin in the 1931 case of *FTC v. Raladam Co.*,<sup>40</sup> in which the Supreme Court indicated that the practice of medicine is not a trade.<sup>41</sup> While until *Goldfarb* the Court had refused to rule directly upon the validity of this "learned profession" exemption,<sup>42</sup> case law in the interim had indirectly reached varying results concerning the issue.<sup>43</sup>

*Goldfarb* puts an end to this uncertainty, stating: "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, . . . nor is the public service aspect of professional practice controlling in determining whether section 1 includes

37. "[P]ersonal effort, not related to production, is not a subject of commerce." 259 U.S. 200, 209 (1922) (dictum).

38. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club*, 348 U.S. 236 (1955); *United States v. Shubert*, 348 U.S. 222 (1955); *Associated Press v. United States*, 326 U.S. 1 (1945).

39. The Fourth Circuit cited both the *Federal Baseball* and *Raladam* cases when it discussed the "learned profession" exemption. In holding that the promulgation of a fee schedule fell within the exemption, it did not, however, indicate to what extent it relied upon either of these cases.

40. 283 U.S. 643 (1931).

41. "They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them." *Id.* at 653 (dictum).

42. 95 S. Ct. at 2012 n.15, citing *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950), and *American Medical Ass'n v. United States*, 317 U.S. 519 (1943).

43. In 1952, for example, the Court indicated that professions may merit "special consideration" because of "ethical, historical and practical" considerations which might distinguish them from other occupations. *United States v. Oregon Medical Soc'y*, 343 U.S. 326, 336 (1952). On the other hand, a wide range of professions, possessing many of the same characteristics as attorneys, have been held to be subject to the antitrust laws. In 1943, the American Medical Association was convicted for its attempt to obstruct a corporation offering prepaid, group-practice medical care. *American Medical Ass'n v. United States*, 317 U.S. 519 (1943). In 1950, the standard real estate commission, set by the Washington, D.C. real estate board, was held to constitute price fixing. *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950). Recently, the Justice Department obtained consent decrees against ethical prohibitions by engineers, architects and accountants on competitive bidding. See *United States v. American Institute of Certified Public Accountants, Inc.*, 1972 Trade Cas. ¶ 74,007 (D.D.C. 1972); *United States v. American Institute of Architects*, 1972 Trade Cas. ¶ 73,981 (D.D.C. 1972); *United States v. American Soc'y of Civil Eng'rs*, 1972 Trade Cas. ¶ 73,950 (S.D.N.Y. 1972). See generally Note, *The Antitrust Division v. The Professions—"No Bidding" Clauses and Fee Schedules*, 48 NOTRE DAME LAW. 966 (1973).

professions.”<sup>44</sup> Clearly, the practice of a learned profession in and of itself provides no exemption from the antitrust laws.

The Court’s opinion, however, was very narrowly drawn. The careful wording of the case suggests the Court’s apprehension that more controversial cases will soon follow. In holding that the practice of law is subject to the Sherman Act, *Goldfarb* may have effects on the legal profession beyond the mere invalidation of minimum fee schedules. Other professional regulations having anticompetitive effects, such as prohibitions against advertising and solicitation, may now be brought before the courts.<sup>45</sup>

It seems certain that the more harmful aspects of advertising and soliciting can be prohibited without violating the antitrust laws. The *Goldfarb* court concluded its opinion by recognizing that

in some instances the State may decide that “forms of competition usual in the business world may be demoralizing to the ethical standards of a profession” . . . . In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.<sup>46</sup>

It remains to be seen, however, whether advertising or solicitation may be prohibited altogether without violating the Sherman Act. One potential exemption likely to be argued in support of such a ban has been referred to as the “noncommercial purpose” exemption.<sup>47</sup> Under this exemption, those activities of a profession which

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44. 95 S. Ct. at 2013.

45. Deputy Assistant Attorney General Bruce Wilson, of the Justice Department’s Antitrust Division, recently told a combined meeting of the Idaho State Bar and Alaska Bar Associations:

If, as *Goldfarb* clearly mandates, we are going to have price competition [among attorneys], it seems to me that we must have some means of informing the public of what lawyers do and what lawyers can do for people . . . . And, after *Goldfarb*, any agreement to restrict this sort of advertising could be held in violation of the antitrust laws.

44 U.S.L.W. 2008 (July 1, 1975). See also *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974), where the court recognized a consumer’s right to know price information. See generally Note, *Legal Ethics—Advertising and Solicitation by Public Interest Law Firms*, 51 TEXAS L. REV. 169 (1972); Note, *Advertising, Solicitation and the Profession’s Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972).

46. 95 S. Ct. at 2016; accord, *United States v. Oregon State Medical Soc’y*, 343 U.S. 326 (1952). See also *Selmer v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935); *Levin v. Doctors Hosp., Inc.*, 233 F. Supp. 953 (D.D.C. 1964), *rev’d on other grounds*, 354 F.2d 515 (D.C. Cir. 1965).

47. *Marjorie Webster Junior College, Inc. v. Middle States Ass’n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir. 1970). Although the learned profession exemption

serve a noncommercial purpose are considered to be outside the trade or commerce requirement of the antitrust laws, while those which are found to be more entrepreneurial than professional are treated as being within the coverage of antitrust legislation.<sup>48</sup>

Although professing to take no view on any situation other than the one before it, the Court in *Goldfarb* did state that "the practice of law as a profession . . . has [its] *business aspect*, and section 1 of the Sherman Act [o]n its face shows a carefully studied attempt to bring within the Act every person *engaged in business* . . . ."<sup>49</sup> The Court goes even further to point out that

[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.<sup>50</sup>

The emphasis in *Goldfarb* on the mercantile aspects of the practice of law may indicate the path that will be followed when the Court is eventually confronted with the problem of advertising and solicitation. Certainly, although the Court does reiterate the existence of a heavy presumption against implicit exemptions, a plausible argument in favor of the existence of a noncommercial purpose exemption in respect to some activities can be made.

It should also be noted that prohibitions on advertising and solicitation may not be considered per se violations of section 1, and may, thus, be subject instead to the "rule of reason,"<sup>51</sup> as are most restraints of competition. Under a per se rule, agreements or prac-

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may seem closely related to the noncommercial purpose exemption, it does not distinguish theoretically between the commercial and noncommercial aspects of a profession. For a more complete analysis, see Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962); Note, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist*, 3 U.C.L.A.—ALASKA L. REV. 207 (1974).

48. *E.g.*, Northern Cal. Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), cert. denied, 371 U.S. 862 (1962); United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D. Utah), aff'd per curiam, 371 U.S. 24 (1962). In both cases, the court invalidated price schedules for prescription drugs under the Sherman Act, distinguishing the "noncommercial" aspects of pharmacy.

49. 95 S. Ct. at 2013 (emphasis added) (footnote omitted).

50. *Id.* at 2013 n.17.

51. See *Standard Oil Co. v. United States*, 221 U.S. 1, 63-70 (1911).

tices are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business purpose for their use. The rule of reason, however, calls for a balancing of the various harms occasioned to the public against the benefits likely to result from the activity. The test of the legality of a practice under the rule of reason is whether the effect upon competition in the marketplace is substantially adverse.<sup>52</sup> A court might conclude, for instance, that the greater public awareness of the availability of legal services, resulting from advertising and solicitation, may outweigh the various evils threatened by these activities, and forbid the bans to continue.

Thus, even though fee schedules are not immune from Sherman Act scrutiny, it remains to be seen whether the professional bans on solicitation and advertising will survive. If not, then it is likely that the economics, as well as the nature and character of the practice of law, will change dramatically.

ROBERT CORY SCHNEPPER

## **Compelling State Interest Test Applied to Denial of Rezoning Request**

Metropolitan Housing Development Corp. ("Metropolitan"), organized for the purpose of developing low and moderate income housing, acquired a vacant 15-acre parcel for a proposed 190-unit, federally subsidized, townhouse development in the village of Arlington Heights, a suburb of Chicago. The property was part of an 80-acre parcel belonging to a Catholic religious order which had its novitiate and high school thereon. The larger parcel had always been zoned R-3, single-family, and was surrounded by single-family homes.<sup>1</sup> The proposed townhouses would require a rezoning of the 15-acre parcel to R-5, multifamily. Metropolitan took the necessary administrative steps to obtain that rezoning. The village's Plan Commission, after holding public hearings, recommended against the rezoning as, under its comprehensive plan, rezoning to R-5

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52. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

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1. The religious order's use of the land was a pre-existing, nonconforming use at the time the first zoning ordinance went into effect in 1959.